No. 2696

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. F. WETZEL,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

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FRANK D. MONCKTON, Clerk.

By....., *Deputy Clerk.*

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There are only two points raised by the plaintiff in error, both going to the indictment. The first point is that the indictment charges the same offense in each of the three counts. The defendants below attempted to meet this alleged defect first, by a motion to quash, and then by a motion to require the prosecution to elect as to which of the three counts the trial would proceed upon. There is no question but that the motion to quash as to the whole indictment was properly overruled. Clearly an indictment which is good as to any one of three counts, should not be wiped out in its entirety if it should appear that the second and third counts do not add anything to the indictment, but are repetitions of the offense charged in the first count. If

the defendant's theory is correct, the motion to quash should have been directed to two of the counts of the indictment only. No such motion was ever made or ruled upon.

The motion to require the Government to elect, is a proper method of procedure if it should appear that the indictment is bad in the particulars first named, and that the defendant will be prejudiced in his substantial rights in being compelled to go to trial on the three counts.

The statute, Section 211 Federal Criminal Code, provides that:

> "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information directly or indirectly, where, or how, or from whom, any of the herein before mentioned matters, articles or things may be obtained or made, or where, or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed * * * is hereby declared to be non-mailable * * *."

The first count of the indictment charges that the letter and notice gave information where divers articles and information designed and intended for producing an abortion might be obtained.

The second count charges that it gave information where an operation for the procuring and producing of an abortion could be performed.

The third count charges that it gave information as to who would perform the operation.

There is no question that each count states a public offense as I shall subsequently show in defense of the indictment on the second point of attack.

Counsel for the Government is familiar with the cases of *Lee* vs. *U. S.,* 156 Fed. 948, and *Burton* vs. *U. S.,* 142 Fed. 57, and is forced to admit that the ruling of the courts in those cases that an indictment in one count for mailing a letter containing the several kinds of information, is not duplicitous, argues strongly that the one mailing constitutes one offense only. That the statute may be given the construction placed upon it by the pleader in this case, is suggested by Mr. Justice Shiras in the case of *Swearingen* vs. *U. S.,* 161 U. S. 446 *et seq.*; 44 L. Ed. 765.

In that case the Court said in discussing an indictment under this same section:

> "The language of the statute is that 'every obscene, lewd, or lascivious book or paper' is non-mailable, from which it might be inferred that each of those epithets pointed out a distinct offense. But the indictment alleges that the newspaper article in question was obscene, lewd and lascivious. If each adjective in the statute described a distinct offense, then these counts would be bad for duplicity and the defendant's motion in arrest of judgment ought to have been sustained. We, however, prefer to regard the words 'obscene, lewd or lascivious' used in the statute, as describing one and the same offense. That was evidently the view of the pleader and of the Court below, and we think this is an admissible construction."

The pleader in the case now before this Court evidently took a different view and I leave it to the Court to determine whether or not this is an admissible or proper construction of the statute. I desire to suggest also that it is easier to differentiate between the three kinds of matter referred to in the indictment now under consideration, than it is between the three terms "obscene," "lewd" and "lascivious."

The Circuit Court of Appeals for the Seventh Circuit in the case of *DeGignac et al.* vs. *U. S.,* 113 Fed. 197, p. 201, said:

> "The gist of the offense is the giving of the information by mail."

If that is true, we submit that three different kinds of information were given by mail by means of the letter set up in the indictment, and that the giving of each kind of information is particularly denounced by the statute.

The second point raised by plaintiff in error that the indictment is bad because the letter pleaded is innocent on its face and the pleader does not set out the other extrinsic facts upon which the Government relies to show that it contained information forbidden by the statute, is clearly not good. Counsel relies on the case of *U. S.* vs. *Grimm,* 45 Fed. 558; *U. S.* vs. *Grimm,* 50 Fed. 528, and *Grimm* vs. *U. S.,* 156 U. S. 604, and cites the first case for an example of bad pleading and the other two for an example of good pleading in a case of this kind.

The first reference is proper enough, but a careful reading of the case reported in 50 Fed. 528 and 156 U. S. 604, does not disclose that either the District Court or the Supreme Court considered that all of the matter set forth in the indictment there under discussion were necessary, or that a setting out of the whole correspondence was necessary in order to make the indictment good. In other words, while the Supreme Court has held that the indictment in the second Grimm case is good, it has not held that an indictment which adopts another means of setting forth the information required by law to make a good indictment is not equally good, if it furnishes the required information.

The indictment under examination here after setting up the letter or notice, has in the first count a direct allegation "that said figures so pasted on the back of said circular as aforesaid, then and there gave information that divers articles and things designed adapted and intended for producing abortion, might be obtained at No. 938 Fillmore Street, in the City and County of San Francisco, California. * * * " (Tr. pp. 4, 5). There is a corresponding allegation in each of the other two counts.

The indictment in the first Grimm case merely sets up the letter or notice, innocent upon its face, and contains no allegation whatever to show that it actually gives information as to where the obscene

matter may be secured, and so on that account was held to be insufficient (*U. S.* vs. *Grimm,* 45 Fed. pp. 558, 559).

This was observed by the Circuit Court of Appeals in the case of *DeGignac et al.* vs. *U. S.,* 113 Fed. 197, where the Court said at the bottom of page 201, in referring to the first Grimm case:

> "In the first Grimm case the main objection to the indictment and the one on which it was held insufficient for uncertainty was that it did not contain any averment either in the writing itself or by way of explanation as to the place where the objectionable matter could be obtained. The indictment failed to aver that the writing complained of conveyed the information denounced by the statute."

The indictments in the first and second Grimm cases are fully discussed in the DeGignac case above referred to, and the Court says at pages 200 and 201 of Vol. 113 Fed., with regard to the indictment in the second case:

> "Counsel contend that an indictment drawn under this section for mailing prohibited matter, or for mailing a writing giving information where such matter may be obtained, is subject to the rule of pleading applicable to indictments for slander, libel, forgery, etc.; that the case at bar is strictly analogous to an indictment for criminal libel; that therefore, in order to make a good indictment, the writing itself must upon its face purport to be what is prohibited, or, failing in that, the indictment must contain explanatory allegations, averments, or writings

showing that the writing itself, interpreted by such explanations, does not contain what is prohibited.

"This contention cannot be sustained. The primary object of this federal enactment (Sec. 3893 Rev. St. U. S.) is to protect the mails from corrupt communications. The incidental purpose of the law is to protect the public morals. The law has been construed by the Supreme Court. It is not necessary, in an indictment under this section, that all the words constituting the information should be pleaded, with the particularity used in cases for libel and forgery. It is sufficient that the character of the information be described, leaving further disclosures to the introduction of evidence. The offense here denounced is the giving of information by mail where obscene matter may be obtained. Any communication by mail which does this is actionable. The gist of the offense is the giving of the information by mail. It is not necessary to aver ownership or possession of the obscene matter. Neither is it necessary to aver that the information was given to one who inquired for or desired the same. One very common purpose of those who violate this statute is the corruption of the young and the innocent. It is not necessary that the writing complained of should in terms describe the obscene matter. The writing may be innocent and harmless on its face. Yet, if it in fact gives information where obscene matter may be obtained, and the explanatory averment so states, it cannot save the plaintiffs in error harmless because the obscene matter in question is described by the indefinite term of 'views'."

We submit that each count of the indictment standing alone, properly states an offense. The record shows (Tr. p. 31) that the Court granted

defendant's motion for a new trial as to the first count of the indictment, and denied it as to the second and third counts, upon which counts sentence was pronounced. The sentence was imprisonment for the term of six months in the Alameda County Jail, which sentence is easily supported by each of the counts in view of the fact that the penalty prescribed by the statute, and which might have been imposed upon each count, is a fine of not more than $5000 or imprisonment for not more than five years, or both.

Bearing in mind Section 1025 Revised Statutes, we submit that the defendant was not, in the course of the trial, deprived of any substantial right.

Respectfully submitted,

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